conception that the original contract is in the nature of a continuing proposal, which, if not withdrawn, the corporation on its organization may accept. Alger on Promoters, § 202; *Pratt* v. *Oshkosh Match Co.*, 89 Wis. 406. It is said that there can be no difference between its making a contract by accepting or adopting an agreement originally made in advance for it and its making an entirely new contract; the adoption or acceptance, though in its nature a ratification, differing in its legal effect in that the contract dates from the time of the adoption, and not from the time of the original transaction. *McArthur* v. *Times Printing Co.*, 48 Minn. 319. This doctrine, it would seem, is defensible on principle, as well as on practical grounds, though it will only cover that class of cases where the facts may rationally be construed as a proposal. In the principal case it does not appear from the brief report whether the facts could be so construed. The decision, however, is treated as governed by *In re Northumberland Hotel Co.*, *supra*, where the promoter acted expressly "as trustee on behalf of an intended company," and the third party intended to bind the company. Under such circumstances, where the parties who make the original contract intend that the corporation when formed shall become or have an opportunity of becoming a party to it, it does not seem unreasonable to treat that contract as constituting or including an offer open to the corporation to accept on its coming into existence.

BREACH AFTER PART PERFORMANCE OF INSTALMENT CONTRACTS. — There is much confusion in the law as to whether or not in an instalment contract a failure of performance with respect to one instalment justifies an abandonment of the whole agreement. In England, though the authorities are irreconcilable, there is a general tendency to maintain the contract, while the American decisions, on the other hand, incline toward the doctrine of *Norrington* v. *Wright*, 115 U. S. 188, allowing a rescission. In a contract to deliver wood in instalments, payment to be made on delivery, the Supreme Court of Michigan, after reviewing the authorities, decided that a refusal to pay for the third instalment was not such a breach as to excuse the defendant from making further deliveries. *West* v. *Bechtel*, 84 N. W. Rep. 69. The decision is put on the ground that under the circumstances the plaintiff's refusal to pay did not evince an intention no longer to be bound by the contract. The English decisions where non-payment is the breach are relied on, and the rule of *Mersey Steel Co.* v. *Naylor*, 9 App. Cas. 434, is adopted.

The court in the principal case evidently distinguishes a breach by non-payment from a breach by non-delivery, *Norrington* v. *Wright*, *supra*, being quoted as not involving the exact point at issue. On principle, it is difficult to discover any validity in the distinction. It is true that non-delivery may be and often is a breach *in limine*, while non-payment, owing to its very nature, must always be a breach after part performance. In divisible contracts, however, the materiality of the breach, as affecting the main object of the transaction, should not greatly differ whether made at the outset or after part performance. Although the parties cannot always be put *in statu quo*, they may at least be placed in substantially as good a position. If, then, we adopt the doctrine of *Norrington* v. *Wright*, *supra*, where the breach was non-delivery after a part of the first instalment had been accepted, it seems difficult to sup-

port the principal case. If there has been a wrongful failure of performance the question of intention should be immaterial. Once the contract has been substantially broken, it does not help matters that the wrongdoer has the best of intentions for the future. Though this doctrine goes somewhat farther than the English decisions, and has been repudiated in New Jersey, *Gerli* v. *Poidebard Silk Mfg. Co.*, 31 Atl. Rep. 401, it seems sound on principle. See 9 HARVARD LAW REVIEW, 148. As to exactly what constitutes a material breach no definite rule can be laid down. It is purely a matter of judicial opinion. But it certainly would seem that the materiality of the breach should in no way be measured by the intention of the wrongdoer. Otherwise an instalment contract becomes perverted into an agreement to engage in a succession of lawsuits for such damages as the vendor may be able to recover, as a substitute for what he expressly bargained. Unless the wrongdoer can plead a defence for his default, according to sound business principles he should not be allowed to rely on his intention in case of the other party's failure to perform.

DEATHS CAUSED BY A COMMON DISASTER. — Where several perish in the same disaster, the common law, differing from other legal systems, has always refused to raise any presumption of survivorship. Not only has it refused to presume that a particular one survived, but it has also refused to presume that death occurred at the same time. *Wing* v. *Angrave*, 8 H. L. C. 183. Where, however, the distribution of property is in question, the heirs-at-law are favored, and no one is allowed to claim without proof rights to property which are based on survivorship. Accordingly, the property is distributed as if death had occurred at the same moment. But this is only a rule of distribution and not a presumption of fact. *Newell* v. *Nichols*, 75 N. Y. 78.

In a recent case, the court seems to have overlooked this distinction between a presumption and a rule of distribution. A Fraternal Benefit Association had, by a death benefit certificate, promised to pay a sum of money to the wife of an assured member upon his death, and "in case she died before" her husband, then to the assured's heirs. Both husband and wife lost their lives in a fire, and there was nothing to show which died first. Upon a bill of interpleader by the association, the court held that the matter must be treated as if both had died at the same time, and, as the benefit had never vested in the wife, it should go to the assured's heirs. *Balder* v. *Middeke*, 5 Chicago Law Journal (N. S.), 325.

It will, however, be recognized that the court was not engaged in distributing the estate of a deceased person, but in the interpretation of a contract. The rule of distribution which favors the heir therefore can here have no application, and the common law neither favors nor hinders any one by a presumption. Moreover, as the question arises on a bill of interpleader, there is no burden of proof upon either one as against the other except such as the contract itself imposes. But there is clearly a difference between the rights of the parties under the contract. The claimants are called upon by the interpleader bill to state their causes of action to the court, and, to do this, each must frame a declaration against the company containing all the allegations essential to establish his right. This he must support by affidavits and by evidence if necessary. The promise to pay the widow is limited by a condition which is